United Nations

AT

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1055
25 July 2002

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1055

Cases No. 1013: AL-JASSANI
No. 1017: AL-JASSANI

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Julio Barboza, Vice-President, presiding; Ms. Marsha A. Echols; Ms. Brigitte Stern;

Whereas, on 14 March 2001, Abdul Razzaq Al-Jassani, a former staff member of the United Nations Development Programme (hereinafter referred to as UNDP), filed an application that did not fulfil all the formal requirements of article 7 of the Rules of the Tribunal;

Whereas, on 22 April 2001, the Applicant after making the necessary corrections, filed an Application in which he requested, in accordance with article 12 (the former article 11) of the Statute of the Tribunal, the revision of Judgement No. 955 regarding the calculation of the Applicant's termination indemnity rendered by the Tribunal on 31 July 2000 (the "first case");

Whereas the pleas in the "first case" read, in part, as follows:

"II: PLEAS

I request the Tribunal to revise its Judgement No. 955 pursuant to article [12] of the Statute of the Tribunal in order to:-

1. [Award] payment of [an] additional 50 per cent of termination indemnity pursuant to staff regulation 9.3 (b), [the Tribunal's] precedents and the [abolition] of my post.

2. Award me ... appropriate and adequate compensation for material injuries as a direct consequence of UNDP actions ...

3. Award compensation for negligence on the part of the Tribunal in sending the Judgement in French language and the unreasonable delays [in] implementing ... Judgement No. 955.

4. [Award] costs."

Whereas, on 24 May 2001, the Applicant after making the necessary corrections, filed an Application in which he requested, in accordance with article 12 (the former article 11) of the Statute of the Tribunal, the revision of Judgement No. 956 regarding the Applicant's request for reimbursement of deductions from his salary, rendered by the Tribunal on 31 July 2000 (the "second case");

Whereas the pleas in the "second case" read, in part, as follows:

"II: PLEAS

I request the Tribunal to revise its Judgement No. 956 pursuant to article [12] of the Statute of the Tribunal in order to:-

1. Conclude that I had been treated differently from other [United Nations] and UNDP staff members ...

[2]. Rule that the 2 months salaries advanced to me in July 1993 [were] properly and legally processed ...

[3]. Order reimbursement of US$ 4732.80 which was deducted from my due bonus and supplement salary ..., plus an appropriate interest ...

[4]. Order ... appropriate and adequate compensation for lack of due process, procedural irregularities and moral injuries as a direct consequence of the management actions.

[5]. [Award] costs ..."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer in the "second case" until 31 October 2001 and in the "first case" until 31 January 2002;

Whereas the Respondent filed his Answer in the "second case" on 15 October 2001 and in the "first case" on 30 November 2001;

Whereas the Applicant filed Written Observations in the "second case" on 4 November 2001 and in the "first case" on 5 January 2002;

Whereas the facts in the "first case" were set forth in Judgement No. 955

Whereas the facts in the "second case" were set forth in Judgement No. 956.

Whereas the Applicant's principal contentions in the "first case" are:

1. The Tribunal based its Judgement on two precedents, copies of which the Applicant received only recently, one of which should be construed as favouring the Applicant's case.

2. The Tribunal erred in not recognizing the Applicant's entitlement to 50 percent additional termination indemnity due to the abolition of his post.

3. The Tribunal erred in determining that the Applicant was not subject to harassment.

Whereas the Respondent's principal contention in the "first case" is:

The Applicant failed to introduce any fact of a decisive nature, which was unknown to the Tribunal and to the Applicant at the time Judgement No. 955 was rendered.

Whereas the Applicant's principal contentions in the "second case" are:

1. A confidential memorandum from the Resident Representative, a.i., in Iraq to the Chief, Compensation and Classification Section, Division of Personnel, the existence of which was unknown to the Applicant and to the Tribunal at the time Judgement No. 956 was rendered, constitutes a new fact of a decisive nature.

2. The Applicant suffered discrimination in the implementation of UNDP guidelines.

3. The Applicant's rights of due process were denied.

Whereas the Respondent's principal contention in the "second case" is:

The Applicant failed to introduce any fact of a decisive nature, which was unknown to the Tribunal and to the Applicant at the time Judgement No. 956 was rendered.

The Tribunal, having deliberated from 27 June to 25 July 2002, now pronounces the following Judgement:

I. The Applicant seeks the revision of Judgements No. 955 and No. 956 of July 2000. His Applications are governed by article 12 of the Statute of the Tribunal. Having reviewed the two Applications, the Tribunal rejects them because the criteria of article 12 are not met in these cases.

II. As a preliminary matter, the Tribunal must address the Applicant's insistence that article 11, rather than article 12, of the Statute applies to his Applications for revision. He is correct, under the old numbering system for the Statute. When the General Assembly revised the Statute in resolution 55/159 of 12 December 2000, the number of the relevant article changed from article 11 to article 12.

III. Article 12, in pertinent part, permits an applicant to seek the revision of a judgement "on the basis of the discovery of some fact of such a nature as to be a decisive factor, which fact was, when the judgement was given, unknown to the Tribunal and also to the party claiming revision, always provided that such ignorance was not due to negligence." The unwavering precedent of the Tribunal is to follow strictly the "rigorous conditions" of article 12. (See Judgement No. 556, *Coulibaly* (1992), para. I.) The burden is on the Applicant to convince the Tribunal, as outlined in article 12, that the Tribunal should undo a judgement that has *res judicata* effect.

IV. In these Applications for revision the alleged new fact of a decisive nature is distinct to each. In the "first case", which primarily concerned challenges to several calculations made by the Respondent, the alleged new facts are two Judgements cited as precedent by the Tribunal in Judgement No. 955. Obviously then, these facts were known to the Tribunal, making it impossible for the Applicant to fit his interpretation within the narrow confines of article 12.

In the "second case", in which the Applicant's claims of discriminatory treatment are important, the alleged new fact is a 2 June 1994 memorandum from the UNDP Resident Representative, *a.i.*, to the Chief, Compensation and Classification Section, Division of Personnel. The memorandum disputes certain claims made by the Applicant, responds to his claims that he was treated differently than certain other staff and distinguishes his case from

the cases he cited. The Applicant asserts that the memorandum, which was marked "Confidential", was sent to UNDP in New York and was included in his file without his comments, in contravention of ST/AI/292 of 15 July 1982, entitled "Filing of Adverse Material in Personnel Records". In his Observations the Applicant claims that the memorandum had not been seen by him or by the Tribunal.

The purportedly decisive nature of the claimed new fact, according to the Applicant, is that the memorandum was "full of illegal and false [j]ustification of the discriminatory action of the [A]dministration on the case in question." The Applicant does not carry his burden of explaining how, even if this were a new fact, it is decisive and could change the result of the Judgement. Before issuing its Judgements No. 955 and No. 956, the Tribunal considered the claims made by the Applicant that he was treated "differently" and that the procedures were inappropriate. The Applicant has always claimed that the actions of the Respondent were unwarranted. His arguments were unconvincing.

In Judgement No. 669, *Khan* (1994) the Tribunal considered a similar claim. There it found that the "new" memorandum, which also was not transmitted to that Applicant, was not a "decisive factor", because the information contained in it had been considered during proceedings to adjudicate the Applicant's claim. Thus the "new" memorandum could not have affected the outcome of the case. "The Applicant's defence was not impaired by the Applicant's ignorance of the memorandum".

V. Likewise, in the Application for the revision of Judgement No. 956 the information in the 2 June 1994 memorandum is neither new nor decisive. It is not new, because the gist of its contents was known. It is not decisive, since its contents - which were known - could not change the outcome of the dispute. The information in the memorandum is not "sufficiently important to have affected the Tribunal's decision". (Judgement No. 896, *Baccouche* (1998), para. I.) The failure of the Respondent to make the memorandum available to the Applicant in both cases presents a different claim and has "no bearing on the outcome of the case." (*Ibid.* para. V)

VI. The Applicant also claims that the Tribunal failed to consider certain evidence, in part because the Judgements of the Tribunal failed to refer specifically to the statements and other information he cites. While this claim and his claims concerning payments are inappropriate in an application for revision under article 12, the Tribunal notes that each Judgement refers to the pleas, facts and contentions of the parties, as well as the report and recommendations of

the JAB, before beginning with the words "having deliberated". In addition, the Tribunal reviews the full pleadings in the matters before it. The Tribunal notes its comment in the *Khan* revision case that the text of the Judgement clearly showed that all the points raised by the Applicant were duly disposed of. The same situation exits here, even if each point raised by the Applicant is not specifically mentioned.

VII. "No party may seek revision of the judgement merely because that party is dissatisfied with the pronouncement of the Tribunal and wants to have a second round of litigation." (Judgement No. 894, *Mansour* (1998), para. II.) Yet the Applications in these cases are in reality a restatement of the claims asserted by the Applicant. No one should believe that a mere restatement of claims, even though made in new language and with changed emphasis, can be a basis for the revision of a Judgement made by the Tribunal. As stated in *Coulibaly*, a revision is not a means of reopening issues that have been settled definitively and which are thus *res judicata*. See also *Baccouche*, in which the Tribunal explained that an application for a revision must not be confused with an appeal, since the Tribunal's judgements are final and not subject to appeal.

VIII. Having considered the pleas, the contentions of the parties and all the record, the Tribunal dismisses the Applications in their entirety.

(Signatures)

Julio BARBOZA
Vice-President, presiding

Marsha ECHOLS
Member

Brigitte STERN
Member

Geneva, 25 July 2002

Maritza STRUYVENBERG
Executive Secretary

United Nations **AT**

Administrative Tribunal

Distr.
LIMITED

AT/DEC/1056
26 July 2002

ORIGINAL: ENGLISH

ADMINISTRATIVE TRIBUNAL

Judgement No. 1056

Case No. 1152: KATZ

Against: The Secretary-General of the United Nations

THE ADMINISTRATIVE TRIBUNAL OF THE UNITED NATIONS,

Composed of: Mr. Mayer Gabay, President; Ms. Marsha A. Echols; Mr. Omer Yousif Bireedo;

Whereas at the request of Stephen Katz, a staff member of the United Nations, the President of the Tribunal, with the agreement of the Respondent, extended to 31 December 2000 the time limit for the filing of an application with the Tribunal;

Whereas, on 31 August 2000, the Applicant filed an Application requesting the Tribunal:

"...

A. ...[T]o rule that the due process rights of the Applicant were violated in the proceedings before the Joint Appeals Board (JAB), as a result of:

(a) [T]he failure of the JAB to obtain the full written [record] of the promotion proceedings before the Appointment and Promotion Board (APB),

...

(d) [T]he failure of the JAB and the Respondent to provide to the Applicant the full written record of the promotion proceedings before the APB.

B. ... [T]o rule that the decision of the Respondent to promote the competing female candidate in preference to the Applicant to the post in question:

(a) [R]esulted from a denial of due process and breach of procedure, in that the decision was based on findings of the APB which were contrary to or unsupported by the record before it and which were not in conformity with the procedure provided for in ST/AI/412 of 5 January 1996, and

(b) [W]as in violation of the Charter, relevant General Assembly resolutions and the Staff Regulations.

C. ...

(a) [T]o order the Respondent to promote the Applicant to the next D-1 post for which he applies and for which he meets all of the requirements, and

(b) [T]o award the Applicant damages in the amount of $40,000 for the pecuniary and moral damages that he has suffered."

Whereas at the request of the Respondent, the President of the Tribunal granted an extension of the time limit for filing a Respondent's answer until 31 January 2001 and periodically thereafter until 1 June 2001;

Whereas the Respondent filed his Answer on 30 May 2001;

Whereas, on 11 July 2001, the Applicant filed Written Observations amending his pleas as follows:

"In addition to the Pleas set forth in Section II of the Application, the Applicant asserts the following additional Plea, identified as C (c), to be added after Plea C (b):

(c) [T]o order the Respondent to calculate the Applicant's pension as if he had been promoted to the D-1 level as of 7 May 1998."

Whereas the facts in the case are as follows:

The Applicant joined the Organization on a three-month fixed-term appointment as a Legal Officer at the P-3 level with the International Trade Law Branch, Office of Legal Affairs (OLA), Vienna, on 23 June 1981. His fixed-term appointment was extended several times and effective 1 July 1984 he was granted a permanent appointed and was promoted to the P-4 level. On 1 November 1990, the Applicant was reassigned to the General Legal Division (GLD), OLA,

New York. Effective 1 May 1991, the Applicant was promoted to the P-5 level and his functional title was changed to Senior Legal Officer.

On 30 July 1997, the Applicant submitted his application to the D-1 level post of Principal Legal Officer, GLD, OLA. On 23 December 1997, OLA recommended that the Applicant be promoted to the post as he was the superior candidate. According to OLA, another, female, candidate ("the female candidate") from GLD was less qualified than the Applicant. However, on 10 March 1998, the APB decided to recommend the female candidate to the post. Following a further review of the case at the request of the Under-Secretary-General for Management, the APB upheld its original recommendation, on the grounds that the candidates were equally qualified, and in keeping with administrative instruction ST/AI/412, on the achievement of gender equality.

On 29 April 1998, the Secretary-General approved the APB's recommendation.

On 26 June 1998, the Applicant requested the Secretary-General to review the administrative decision not to promote him to the D-1 level.

On 3 September 1998, the Applicant lodged an appeal with the JAB. His appeal included a request that the JAB obtain from the APB, and provide him with, all records and documents relating to this promotion exercise.

On 21 September 1999, the Secretary of the JAB requested the APB to provide the Panel with the minutes from the APB meetings regarding the filling of the subject D-1 post. On 6 December 1999, the Panel was provided with "true, accurate and complete copies of the notes taken by the Secretary [of the APB]". These were disclosed to the JAB on the understanding that they should not be communicated to the Applicant.

The JAB adopted its report on 4 April 2000. Its considerations, conclusions and recommendations read, in part, as follows:

> "***Considerations***
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> ...
>
> 17. The Panel considered that the Appellant had a legitimate interest in gaining access to the APB meeting records ... On the other hand, the Respondent also had a valid interest in keeping those documents beyond the reach of the parties so as to maintain the APB proceedings as confidential as possible. ...

18. ... [T]he Panel Chairperson decided not to release the APB meeting notes to the Appellant or any one else, as, in her view, the interest of the Respondent in preserving the confidential nature and hence the proper functioning of the APB proceedings far outweighed that of the Appellant in making use of those records to substantiate his allegations and claims.

...

20. ... The Panel felt that the dissemination of those APB documents to the parties ... would compromise the efficiency of the proceedings of the APB and undermine its role as an independent advisory body ...

...

28. It should be emphasized that, rather than an extraneous factor as implied by the Appellant, seniority is one of the criteria for promotion ...

...

Conclusions and Recommendation

32. In light of the foregoing, the Panel unanimously agreed that it was not competent under Staff Rule 111.2(k) to reopen the issue of the relative competence and qualifications of the competing candidates for the D-1 post.

33. The Panel also unanimously agreed that the APB was not required to automatically follow the OLA recommendation ... and that its failure to follow the OLA recommendation constituted no breach of any provision of ST/AI/412.

34. The Panel further unanimously agreed that there existed adequate evidence showing that the Appellant had received fair and full consideration during the promotion exercise and that no adequate evidence had been offered to support the allegations of prejudice and improper motivation.

35. The Panel makes no recommendation in support of the present appeal."

On 13 April 2000, the Under-Secretary-General for Management transmitted a copy of the report to the Applicant and informed him that the Secretary-General had decided to take no further action on his appeal.

On 31 August 2000, the Applicant filed the above-referenced Application with the Tribunal.

Whereas the Applicant's principal contentions are:

1. The failure of the JAB to obtain the full written record of the promotion proceedings before the APB, and the JAB's consideration of and making of a recommendation without having the full written record, violated the Applicant's right to due process.

2. The failure to provide to the Applicant the full written record of the promotion proceedings before the APB violated the Applicant's due process rights.

3. The decision to promote the competing female candidate resulted from a denial of due process and of breach of procedure and was in violation of the Charter, relevant General Assembly resolutions and the Staff Regulations.

Whereas the Respondent's principal contentions are:

1. The Applicant had no right to a promotion to the subject D-1 post.

2. There was no violation of the Applicant's due process rights.

3. The Secretary-General's decision not to promote the Applicant is in accordance with the Charter and the general principles of the Organization regarding the improvement of the status for women in the Secretariat, as mandated by the General Assembly.

The Tribunal, having deliberated from 3 to 26 July 2002, now pronounces the following Judgement:

I. The issue in this case is the Respondent's decision to promote a female candidate, rather than the Applicant, to a D-1 post and the proceedings leading to this decision.

II. The Applicant challenges the recommendations of the JAB and the decision of the Respondent and submits that the Respondent violated the principles set forth in Article 101 (3) of the Charter, the relevant General Assembly resolutions and staff regulation 4.2, all of which provide that in promotion decisions, paramount consideration should be given to "the necessity of securing the highest standards of efficiency, competence and integrity." In this regard the Applicant argues that the achievement of gender equality, as set forth in ST/A1/412 is subject to this paramount consideration. Preference for selection of a female candidate applies only when her qualifications are substantially equal or superior to those of competing male candidates. The

Tribunal in its Judgement No. 671, *Grinblat* (1994), stated that "[Article 101 (3) of the Charter] unequivocally establishes a standard under which less qualified persons are not entitled to preferential treatment based on gender".

Furthermore, the Applicant claims that the JAB based its considerations and recommendations on an incomplete and inadequate record of the APB proceedings, depriving him of a full consideration of his case and consequently violating his rights of due process.

III. The Tribunal notes that the Director, GLD, as well as the Legal Counsel, evaluated the Applicant as the superior candidate and consequently recommended him for the promotion to the D-1 level post. In fact, the record shows that the Director, GLD, indicated that the candidates were not equally qualified and gave compelling reasons as to why the Applicant was the superior candidate in terms of quality of work and overall performance. Notwithstanding the foregoing evaluation, the APB, after conducting an independent review of the information before it, concluded that the female candidate's qualifications met all the requirements for the vacant post and were substantially equal to those of the Applicant.

IV. In its established jurisprudence, the Tribunal has confirmed that appointments and promotions are within the discretionary authority of the Secretary-General. (See Judgement No. 958, *Draz*, (2000) citing Judgement No. 411, *Al-Ali* (1988).) Furthermore, the Tribunal reaffirmed in *Draz* that "qualifications, experience, favourable performance reports and seniority are appraised freely by the Secretary-General and therefore cannot be considered by staff members as giving rise to any expectancy".

V. However, these discretionary powers of the Secretary-General are not absolute. They are governed by the relevant provisions of the Charter and by General Assembly resolutions. In this context the Tribunal notes that ST/AI/412 provides that special measures for the achievement of gender equality within the Secretariat must be instituted towards achieving the goal of "50-50 parity between men and women both overall and for positions at the D-1 level and above by the year 2000". It also provides for flexibility in various promotion requirements "in order to increase the number of women considered for promotions", for example flexibility regarding seniority. Moreover, the Tribunal reaffirmed in *Draz* that the implementation of special

measures for the achievement of gender equality, in compliance with General Assembly resolutions, is fully consistent with the exercise of the Secretary-General's discretionary authority, even if such measures are at the expense of other candidates.

The Tribunal in *Grinblat* made reference to General Assembly resolutions 44/185, 45/239 and 46/100, all of which recalled Articles 8 and 101 of the Charter and urged the Secretary-General to strengthen his efforts to increase the number of women, particularly in senior and policy-making posts and concluded as follows:

> "XVII. The Tribunal recognizes that the various resolutions for improvement of the status of women in the Secretariat which have been referred to and statements of the Secretary-General have conceded the existence of an unsatisfactory history with respect to the recruitment and promotion of women that does not accord with Article 8 of the Charter. In such circumstances, the Tribunal considers that Article 8 of the Charter must be regarded as a source of authority for reasonable efforts to improve the status of women. It would be anomalous indeed if this unsatisfactory history had to remain unremedied for an unduly long period. Unless affirmative action measures are taken towards ameliorating the effects of this past history, they will, without doubt, be perpetuated for many years. This is incompatible with the objectives of Article 8, as recognized by the General Assembly. Hence, the Tribunal concludes that Article 8 permits the adoption of reasonable affirmative action measures for improvement of the status of women."
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> ...
>
> "XIX. Even so, there is room for affirmative action. The Tribunal considers that, as long as affirmative action is required to redress the gender imbalance with which the Secretary-General and the General Assembly have been concerned, Article 8 of the Charter would permit, as a reasonable measure, preferential treatment to women candidates where their qualifications are substantially equal to the qualifications of competing male candidates ..."

The Tribunal finds that these words are still pertinent today, particularly since the goal of 50-50 parity has not yet been reached. The Tribunal therefore finds that the Respondent acted within his discretionary authority in deciding to promote a substantially equally qualified female candidate to the D-1 level post.

VI. As for the Applicant's request to gain access to the APB records, the Tribunal is sympathetic to this legitimate interest in obtaining information on how his candidacy was reviewed, particularly in light of the strong departmental recommendation to promote him and

the contradicting final outcome; at the same time, the Tribunal shares the Respondent's concern, that these documents should be kept beyond the reach of the parties in order to preserve the confidential nature of the APB proceedings and to enable it to function properly and efficiently. Having said this, the Tribunal finds that the JAB had before it all the necessary documents and information, enabling it to reach an informed conclusion.

VII. The fact that the APB did not follow the assessment of the Legal Counsel and the Director, GLD, does not constitute a breach of procedure. The JAB rightly pointed out that "OLA's recommendation remained a recommendation only and was subject to review by the APB, which may accept or reject it, in full or in part". Moreover, the Tribunal notes the Respondent's assertion that, if the APB were to always follow departmental recommendations, this would result in the APB having no role to play in the promotion process.

Thus, the Tribunal finds that the Applicant received full and fair consideration and that no adequate evidence has been offered to support the Applicant's allegations that the contested decision was tainted by procedural irregularities, undue influence or improper motivation.

VIII. In view of the foregoing, the Tribunal rejects the Application in its entirety.

(Signatures)

Mayer GABAY
President

Marsha ECHOLS
Member

Omer Yousif BIREEDO
Member

Geneva, 26 July 2002

Maritza STRUYVENBERG
Executive Secretary